

KING, HOLMES, PATERNO & SORIANO, LLP  
 HOWARD E. KING, ESQ., STATE BAR NO. 077012  
 HKING@KHPSLAW.COM  
 MATTHEW J. CAVE, ESQ., STATE BAR NO. 280704  
 MCAVE@KHPSLAW.COM  
 1900 AVENUE OF THE STARS, 25<sup>TH</sup> FLOOR  
 LOS ANGELES, CALIFORNIA 90067  
 TELEPHONE: (310) 282-8989  
 FACSIMILE: (310) 282-8903

Attorneys for Defendants and Counterclaimants  
 XX GLOBAL, INC. and JACQUES WEBSTER

*[Additional Counsel on Signature Page]*

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PJAM LLC,  
 Plaintiff,  
 vs.  
 XX GLOBAL, INC., JACQUES  
 WEBSTER, and DOES 1-20, inclusive,  
 Defendants.

CASE NO. 2:18-cv-03192 JFW  
 (MRWx)

Hon. John F. Walter

**JOINT BRIEF RE ADDITIONAL  
 JURY INSTRUCTION ON WAIVER**

XX GLOBAL, INC., JACQUES  
 WEBSTER,  
 Counterclaimants,  
 vs.  
 PJAM LLC, JEFFERSON AGAR,  
 ALEX MARTINI, PATRICK  
 JOHNSTON, and ROES 1 through 10,  
 inclusive,  
 Counterclaim Defendants.

Trial Date: April 16, 2019

Action Commenced: March 20, 2018

///

///

1 Defendants XX GLOBAL, INC. and JACQUES WEBSTER (together,  
 2 “Defendants”), and Plaintiff PJAM LLC (“PJAM”) respectfully submit the  
 3 following Joint Brief Re Additional Jury Instruction on Waiver, per the Court’s  
 4 order at trial on April 16, 2019.

5 **Defendants’ Position**

6 The parties have stipulated to additional jury instructions on modification of a  
 7 contract and the clear and convincing burden of proof. An updated set of jury  
 8 instructions has been filed with the Court (ECF No. 85). Thus, the only issue the  
 9 parties address herein is whether the jury should also be instructed on the law  
 10 regarding waiver.

11 Defendants contend that the following instruction on waiver should be given  
 12 to the jury. PJAM disagrees.

13 **CACI No. 336. Affirmative Defense—Waiver**

14 XX Global, Inc. and Jacques Webster claim that Mr. Webster did  
 15 not have to perform at the Myth Live event at 11:45 p.m., as  
 16 stated in the contract, because PJAM LLC gave up its right to  
 17 have Mr. Webster perform at that time. This is called a “waiver.”

18  
 19 To succeed, XX Global, Inc. and Jacques Webster must prove  
 20 both of the following by clear and convincing evidence:

- 21 1. That PJAM LLC knew Mr. Webster was contractually
- 22 required to perform at the Myth Live event at 11:45 p.m.; and
- 23 2. That PJAM LLC freely and knowingly gave up its right
- 24 to have Mr. Webster perform at that time.

25  
 26 A waiver may be oral or written or may arise from conduct that  
 27 shows that PJAM LLC gave up that right.

1 If XX Global, Inc. and Jacques Webster prove that PJAM LLC  
 2 gave up its right to have Mr. Webster perform at the Myth Live  
 3 event at 11:45 p.m., then Mr. Webster was not required to  
 4 perform at that time.

5  
 6 “In contract law, a waiver is defined as an intentional relinquishment of a  
 7 known right, and it must ‘clearly be made to appear from the facts disclosed.’”  
 8 *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 892 (Minn.  
 9 1982) (emphasis omitted) (citing *Kennedy v. Hasse*, 114 N.W.2d 82, 85 (Minn.  
 10 1962)). A waiver of a contractual right may be implied based on a party’s conduct  
 11 after entering into the contract. *Kennedy*, 114 N.W.2d at 85 (affirming lower court’s  
 12 finding of waiver based on defendant’s post-contract conduct).

13 Here, the evidence warrants instructing the jury on the law regarding waiver  
 14 so that the jury may properly determine whether PJAM waived its purported  
 15 contractual right to have Mr. Webster perform at the Myth Live event at 11:45 p.m.  
 16 Alex Martini, the managing partner of PJAM, admitted during his deposition (1) that  
 17 PJAM knew Mr. Webster had to be in Las Vegas by 1:00 a.m. on February 4, 2018,  
 18 and thus he could not perform in Minnesota at 11:45 p.m. on February 3, 2018; and  
 19 (2) that PJAM agreed with Defendants that Mr. Webster could perform at the Myth  
 20 Live event as early as 10:00 p.m. Martini Dep. Tr. at 57:25-58:18. In fact, Mr.  
 21 Martini admitted during his deposition that PJAM knew Mr. Webster could come to  
 22 Minnesota for the event only “if he was assured he would be back in Las Vegas by  
 23 1:00 a.m. *Id.* at 60:5-9.

24 PJAM’s conduct, as demonstrated through exhibits admitted into evidence at  
 25 trial, is entirely consistent with the parties agreeing that Mr. Webster would perform  
 26 **not** at 11:45 p.m., as stated in the contract, but rather at or around 10:00 p.m. Trial  
 27 Exhibit 50-5 confirms that PJAM was made aware of Mr. Webster’s travel  
 28 requirements as early as January 25, 2018, ***before the contract was signed.*** Trial

1 Exhibit 29 similarly shows Jefferson Agar, another principal of PJAM, agreeing to a  
2 “set time” of 10:30 p.m. Moreover, Mr. Stromberg confirmed during his testimony  
3 at trial that the parties never intended for Mr. Webster to perform at 11:45 p.m.—a  
4 time that was merely a “placeholder.” This further explains PJAM’s post-contract  
5 efforts to figure out a mutually agreeable time for Mr. Webster’s performance. It  
6 also explains why PJAM never pushed back when Mr. Stromberg repeatedly asked  
7 for confirmation of travel arrangements based on Mr. Webster performing at or  
8 around 10:00 p.m.

9 Defendants are not requesting a ruling that PJAM waived any right—that is an  
10 issue the jury should decide. But, in order to do so, the jury must understand the  
11 law. That is why this instruction is appropriate.

12 Defendants disagree with PJAM’s contention that Defendants waived their  
13 right to assert this affirmative defense. Today—the first day of trial, after weeks of  
14 meeting and conferring with PJAM’s counsel—is the first time that PJAM or its  
15 counsel even suggested that Mr. Webster was contractually obligated to perform at  
16 11:45 p.m. This new argument is nowhere to be found in any of the pre-trial filings,  
17 including PJAM’s Memorandum of Contentions of Fact and Law (ECF No. 42).  
18 There was no reason to assert this affirmative defense until Defendants’ counsel  
19 became aware of its applicability, today at trial.

20 Defendants also disagree that the stipulated modification instruction  
21 sufficiently addresses the Court’s concerns. Contract modification is a separate  
22 issue from waiver. The jury could find that the parties modified the contract without  
23 reaching the issue of waiver, or the jury could find that the contract was not  
24 modified but PJAM waived its right to have Mr. Webster perform at 11:45 p.m.  
25 through its conduct. The jury should be informed of all appropriate options for  
26 applying the law to the facts; both instructions (modification and waiver) should  
27 therefore be given.

28

1 **Plaintiff's Position**

2 The court requested briefing on the issue of whether jury instructions should  
3 be added on the issues of contract waiver and modification to avoid potential juror  
4 confusion. The source of potential juror confusion is testimony regarding the  
5 contract's integration clause and defendants' position that the contract was  
6 modified.

7 PJAM met and conferred with counsel for Defendants. PJAM stipulated to  
8 Defendants' proposed jury instruction regarding contract modification, and the  
9 related instruction concerning clear and convincing evidence. Those stipulated  
10 instructions have been filed separately. PJAM objects to Defendants' request for a  
11 Waiver instruction on the following grounds:

12 (1) The modification instruction is sufficient to resolve any potential jury  
13 confusion. Defendants' evidence was that PJAM "agreed" to the modified  
14 travel schedule, not that compliance with the original travel schedule was  
15 waived. Mr. Stromberg, the only defense witness, testified that it was his  
16 understanding that Mr. Agar agreed to the modification by email, and  
17 Defendants' introduced Mr. Martini's deposition testimony regarding this  
18 alleged agreement.

19 (2) The requested instruction is "CACI No. 336. Affirmative Defense—  
20 Waiver." Defendants waived their right to assert any affirmative  
21 defenses. Defendants did not raise any affirmative defenses in the Joint  
22 Pretrial Conference Order [Dkt. No. 45] or in their Memorandum of  
23 Contentions of Fact and Law [Dkt. No. 37], as required by Local Rule 16-4.1.

24 For these reasons, PJAM requests that the court deny Defendants' request to  
25 add the requested waiver instruction.

26

27

28

1 DATED: April 16, 2019

KING, HOLMES, PATERNO &  
SORIANO, LLP

4 By: /s/ Howard E. King

5 HOWARD E. KING

6 MATTHEW J. CAVE

7 Attorneys for Defendants and  
8 Counterclaimants XX GLOBAL, INC. and  
JACQUES WEBSTER

9 DATED: April 16, 2019

HILL, FARRER & BURRIL LLP

12 By: /s/ Stephen J. Tomasulo

13 STEPHEN J. TOMASULO

14 Attorneys for Plaintiff and Counterclaim  
15 Defendant PJAM LLC